

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TAWANA GOLSTON et al.,

Plaintiffs and Appellants,

v.

HERTZ EQUIPMENT RENTAL
CORPORATION,

Defendant and Appellant.

D072516

(Super. Ct. No. CIVVS907786)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Gilbert G. Ochoa, Judge. Reversed.

Lombardi, Loper & Conant, John W. Ranucci and Maria M. Lampasona for
Defendant and Appellant.

Law Offices of Martin N. Buchanan, Martin Buchanan; Girardi, Keese and
David R. Lira for Plaintiffs and Appellants.

INTRODUCTION

This is the second appeal, following the third trial, in a product liability case in
which the wife and children (plaintiffs) of decedent Marty Golston (Golston) contend

Hertz Equipment Rental Corporation (Hertz) provided a defectively designed water truck without adequate warnings to Golston's employer, Remedial Construction (ReCon), resulting in Golston's death from a rollover accident in the truck. A jury found Hertz liable for failure to warn and awarded the plaintiffs a total of \$1 million in noneconomic damages and \$890,000 in economic damages. The jury found Hertz 10 percent at fault whereas it assigned 90 percent fault to ReCon and Golston, on a special verdict line listing them together. After considering offsets from prior settlements with other defendants, the court entered judgment for plaintiffs against Hertz in the amount of \$100,000, representing Hertz's 10 percent share of the noneconomic damages plus costs.

Both parties agree the judgment must be reversed because the jury apparently rendered a compromise verdict and the special verdict form was defective in that it listed Golston and his employer on the same line for the jury's assessment of comparative fault. Therefore, we reverse the judgment.¹

Because the issue will inevitably arise on retrial, Hertz requests we address whether the trial court abused its discretion in excluding evidence of Golston's lack of a Class B commercial driver's license with a tank endorsement when the court determined the licensure evidence was more prejudicial than probative under Evidence Code section 352. We conclude the court did not abuse its discretion.

¹ Hertz's challenge to the court's cost award is moot since we are reversing the judgment. Accordingly, we deny Hertz's September 11, 2018 motion to augment the record on appeal to include the reporter's transcript of the hearing on its motion to tax costs.

BACKGROUND

A

ReCon is in the business of environmental cleanup. Oil companies hire ReCon to clean up oil patches. The sites are typically in fields.

ReCon rented trucks, including water trucks, from Hertz. Hertz purchased cabs and chassis from one company and separately purchased water tanks, which were fabricated and attached by another company according to Hertz's specifications. The trucks were then delivered to Hertz to place in its rental inventory. Hertz placed stickers on the trucks with certain warnings and information.

Hertz did not test the water truck for rollover propensities or otherwise study the water truck's handling and stability with a live load of water. It did not place warnings on the vehicles regarding rollover propensity. It did not place a warning on the truck advising an operator not to transport water on a highway.

The tank manufacturer prepared a three-page manual at the request of Hertz to place in the rental trucks. The manual said the vehicle should not transport water on a highway. The tank manufacturer stated the advisory was due to complaints about water splashing out of the tank and causing a hazard to vehicles following behind.

There were no stickers on the truck at issue advising about rollover risk and there was no operator manual inside the truck. Hertz did not warn ReCon not to operate the water truck on a highway when it was filled with water.

B

Golston was considered a "laborator" who did the hands-on work of a laborer, such as working a shovel and performing traffic duties, but who was also interested in operating equipment. When Golston began operating water trucks, ReCon's procedures and safety program required someone to observe and mentor him on every site, including riding along with him to make sure he understood the hazards with operating the water truck. ReCon also required every employee to participate in a defensive driving course. Some training to operate a water truck was on the job.

John Perales, a ReCon regional safety manager, trained Golston to operate water trucks for prior projects. He certified Golston was authorized to operate a water truck on-site only. Golston initially operated an automatic transmission because he had difficulty operating a manual transmission. Operating speeds were approximately 15 miles per hour. Perales discussed issues of water dynamics, slosh, and speed when he trained Golston. Golston also participated in a defensive driving course.

Perales saw Golston operate water trucks on job sites starting in 2003. Golston was very cautious and took his time. Golston asked questions and wanted to learn. He drove under five miles an hour and did very well. He was not the fastest worker, but he was a good worker. Perales considered Golston to be safe, knowledgeable, and a good driver.

Stan Bailey, another ReCon employee, saw Golston operate water trucks on other projects. Most water truck jobs are done on-site because most sites have their own water source. Most sites have speed limitations of 25 to 35 miles per hour.

Perales agreed operating a water truck is less safe on a public road because of other traffic and the need to comply with both minimum and maximum posted speeds, which are higher than speeds used on-site to operate the truck for dust control. There is less chance of rollover on-site because they drive the trucks slowly in first gear while operating the water pump to minimize the creation of dust.

C

The incident occurred on the first day of the Battles Gas Plant project, June 24, 2008. Hertz delivered a water truck to ReCon the morning of the incident. Bailey signed the Hertz rental contract. Bailey testified the contract required the operator of the water truck to have specialized skill, training, and testing.

Bailey was the job superintendent for the Battles project and was Golston's direct supervisor that day. Battles was a small project to spread gravel for a parking lot in preparation for a later excavation project. Three people were assigned to the project: Bailey, a heavy equipment operator who was going to do grading work with a bulldozer, and Golston who was going to do dust control.

Keith Watts was the project manager for both the Battles project and another nearby project known as Wiley. The Wiley site was a few miles away from the Battles site. Watts came to the Wiley site on the morning of the accident to deal with an unrelated matter. He brought Golston with him.

Golston was assigned to drive the water truck for the Battles project. Watts had seen Golston drive a water truck at another project site. Watts thought Golston was the best person for the job because he was cautious and slow. Watts understood Golston was

an experienced driver and saw nothing that concerned him about the way Golston drove the water truck.

Bailey thought Golston had enough time and experience on a water truck to operate it safely. Bailey had no concerns when Golston was assigned to drive for the Battles project because he was slow and safe. Bailey was not aware of whether Golston was qualified to operate a water truck on the highway, but he had never seen him do so.²

Because there was no water source at the Battles project, they decided to use water from the Wiley site. Bailey picked up Golston at the Wiley site in Bailey's personal truck. They drove the route he was going to follow with the water truck from Wiley to Battles after filling the tank. They prepared a journey management plan together. Bailey warned Golston to be cautious of the farm tractors on the highway. Golston did not express concern to Bailey about operating the truck on the day of the incident.

D

Golston made one or two runs to the water source to fill up the water tank before the incident. Bailey saw Golston operate the truck on the day of the incident and observed no problems.

A witness saw the water truck merge slowly onto Betteravia Road about a mile from the intersection with Rosemary Road. The speed limit along Betteravia Road was 55 miles per hour, as was the speed limit on Rosemary Road. The water truck picked up

² Other individuals working on the Battles project or nearby sites were qualified to operate a water truck on a highway. The project manager could have pulled another employee to operate the water truck on the highway rather than Golston.

speed on Betteravia Road to between 30 and 40 miles per hour. The water truck's brake lights and a left turn signal activated as the truck approached the intersection with Rosemary Road. The truck slowed. As the truck turned left, the truck shifted to the right and water came out of the top of the tank. When the truck turned onto Rosemary Road, it flipped over completely and landed on its wheels.

Another witness who was also behind the water truck as it traveled on Betteravia Road thought it may have been traveling a little fast, approximately 30 to 35 miles per hour, before making the left turn. The witness noticed water come out of the top of the tank. The water truck slowed before starting the turn. As it turned, the water truck rolled over and landed on its wheels.

The cab roof was crushed, and the door was jammed so witnesses could not get Golston out of the cab. Golston was hospitalized with a spinal cord injury. He later died as a result of his injuries.

In a hospital interview before he died, Golston estimated he was going 35 miles per hour before he turned left onto Rosemary Road. As he made the turn, the water in the tank shifted and the truck overturned.

E

1

The plaintiffs' accident reconstruction expert ran computer simulations using data from the police reports to reenact the accident. The expert estimated the truck was going 27 miles per hour when it made the first tire mark. There was evidence Golston was braking during the accident.

The truck had a crosswise baffle, which limited the movement of liquid in the tank from front to back. The accident reconstructionist ran simulations showing the truck would not rollover if two additional baffles had been placed in the tank running lengthwise, similar to firetrucks. The expert opined that if additional baffles were in the tank, the truck would have made the turn without rolling over. The material cost for adding the baffles would have been \$500 to \$750.

2

Another expert for plaintiffs, Robert Hooker, acquired a similar truck and water tank to perform testing. Hooker ran three J-tests, in which the vehicle is driven in a straight line at a prescribed speed, then steered to a certain angle and held to observe the performance of the vehicle. He explained water changes the stability of a vehicle because the center of gravity is dynamic and mobile.

In the first test, the tank was empty and the truck entered the turn at 23 miles per hour. The left rear tires lifted off the ground. In the second test, the tank was filled with water and entered the turn at 13.8 miles per hour. The wheels lifted and the vehicle tipped until an outrigger contacted the asphalt suggesting impending rollover. Water sloshed out of the tank. On the third test, when the outriggers were removed and the test was performed with water in the tank and a speed of 18 miles per hour going into the turn, the vehicle rolled over.

Hooker opined the truck was unreasonably dangerous because it would roll over during a simple turning maneuver when it should either slide or spin out. The vehicle's threshold for rollover was extremely low, at speeds of 13.8 miles per hour or higher.

Hooker agreed the water truck could only be safely turned at speeds between 10 and 15 miles per hour. He opined the truck was defective and posed a hazard on the roads to the operator or anyone near it.

3

A human factors expert for plaintiffs opined a warning, including a pictorial graphic, describing the risk of rollover should have been put on the vehicle to remind the driver or those renting the water truck not to transport water on highways. The three-page manual provided by the tank manufacturer, which cautioned against transporting water on highways, was not in the truck at the time of the incident.

Hertz should have provided information about the characteristics and hazards of the truck and communicated those to the person renting the truck. This would include a warning to stay off public highways, drive at slow speeds, or turn corners at very slow speeds. No such warnings were provided. People typically comply with warnings if they are provided, they are easy to comply with, and people reading the warning perceive a benefit to complying.

F

Hertz's defense expert estimated the speed of the vehicle as it crossed the stop bar on Rosemary Road was in the range of 33 and a half to 38 miles per hour and was in the range of 21 to 24 miles per hour when the truck overturned. The expert agreed at the point of tip, if the truck was traveling 21 miles per hour, it could roll over completely.

The defense mechanical engineering expert, Tom Gillespie, estimated the truck came into the turn at approximately 35 miles per hour, which produced lateral

acceleration of about .8 Gs. This is higher than a typical truck could handle, so he opined the shifting load made no difference. He disagreed with the plaintiffs' expert's recommendation for longitudinal baffles saying it would not have prevented the accident. In Gillespie's opinion, the truck would have rolled over at this speed even if the water was frozen. He stated a functional truck could not be built to perform at the level of .8 Gs.

Gillespie agreed, however, that water movement reduces rollover threshold. He also agreed longitudinal baffles would reduce the amount of center mass shift. Gillespie agreed the safe turn range for a tank truck like this is 10 to 15 miles per hour. He also agreed if a hazard cannot be eliminated or mitigated, the standard practice is to warn the end user.

Another defense expert agreed Hertz did not provide information about sloshing or the dynamic effect of a liquid load in a manner to get to drivers such as Golston. He denied industry standards required specific warnings associated with obvious hazards. He said the industry standard required employers to ensure operators are properly qualified.

DISCUSSION

I

The parties agree there are indicators the jury reached a compromise verdict, which is a verdict where some jurors believe evidence of liability is lacking but the jurors compromise on a finding of liability in exchange for a small damage award. (*Lauren H. v. Kannappan* (2002) 96 Cal.App.4th 834, 840 (*Lauren H.*)) Indicators of a compromise

verdict include "(1) a close verdict; (2) jury requests for readback; (3) jury indecision whether the plaintiff should recover a certain amount or nothing; (4) a subsequent jury election to straddle and award a compromise recovery in a lesser amount than that to which plaintiff would be entitled if plaintiff prevailed; and (5) a short trial." (*Id.* at p. 841.)

Here, the jury engaged in lengthy deliberations and asked several questions. The jury reported it was evenly deadlocked on a question and the court gave the jury the deadlocked jury instruction encouraging the jurors to reach a verdict if they could. The jury requested readback of testimony and requests for admissions. The jury eventually returned a verdict finding Hertz liable for failure to warn. It awarded plaintiffs \$250,000 for future economic loss whereas plaintiffs had presented undisputed evidence the future economic loss was in the range of \$709,000 to \$915,000. The jury awarded plaintiffs collectively \$500,000 each for past and future noneconomic damages whereas plaintiffs had sought \$5 to \$10 million. Because it appears the jury reached a compromise verdict, the proper remedy is a new trial on liability and damages. (*Lauren H., supra*, 96 Cal.App.4th at p. 841.)

II

The parties also agree the verdict form was defective because it listed ReCon and Golston on the same line for allocation of fault. Therefore, the special verdict did not resolve the issue of Golston's percentage of comparative fault for purposes calculating setoff and apportionment of economic and noneconomic damages. (*Vollaro v. Lisi* (2014) 224 Cal.App.4th 93, 99 [cotortfeasors are jointly and severally liable for economic

damages, but " 'each defendant is liable for only that portion of the plaintiff[s'] noneconomic damages which is commensurate with that defendant's degree of fault for the injury' "].) Both parties agree reversal is necessary on this basis. (*Vollaro*, at p. 104; *Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 855.)

III

Although the parties agree the judgment must be reversed for the reasons stated, Hertz requests we address whether the court abused its discretion in excluding evidence that Golston did not have a commercial driver's license because this is a recurring dispute between the parties. Hertz contends it should have been permitted to introduce evidence of Golston's lack of licensure to establish negligence and negligence per se for both ReCon and Golston. We disagree and conclude there was no abuse of discretion.

A

Prior to trial, plaintiffs filed a motion in limine to exclude evidence regarding Golston's licensing status on the basis that lack of a license is not admissible to establish negligent operation of a vehicle. Hertz opposed the motion. After considering briefing and arguments of the parties, including the defense arguments, the court agreed it was a key issue, but determined the information about licensure was more prejudicial than probative under Evidence Code section 352.

B

Evidence Code section 352 gives the court discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will

(a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"This exception to admissibility has not been interpreted to create hard and fast rules, but requires the trial court to complete a weighing process (i.e., probative value versus undue prejudice) that considers the unique facts and issues of the case." (*Phillips v. Honeywell Internat. Inc.* (2017) 9 Cal.App.5th 1061, 1081.) "The 'undue prejudice' mentioned in Evidence Code section 352 refers to evidence which uniquely tends to evoke an emotional bias against the party as an individual and which has very little effect on the issues—it is not synonymous with 'damaging.' [Citation.] In general, evidence is substantially more prejudicial than probative if it creates an intolerable risk to the fairness of the proceedings or the reliability of the outcome." (*Ibid.*)

The trial court has broad discretion in determining the admissibility of evidence under Evidence Code section 352. (*People v. Jones* (2013) 57 Cal.4th 899, 949.) "We review claims regarding a trial court's ruling on the admissibility of evidence for abuse of discretion. [Citations.] Specifically, we will not disturb the trial court's ruling 'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266.)

C

California has long held "[l]ack of a driver's license is not evidence of the negligence of the driver, and except in special situations, it is error to permit proof of the absence of a license." (*Shmatovich v. New Sonoma Creamery* (1960) 187 Cal.App.2d

342, 344 (*Shmatovich*), overruled on other grounds in *Prichard v. Veterans Cab Co.* (1965) 63 Cal.2d 727, 732.) In *Hunton v. California Portland Cement Co.* (1942) 50 Cal.App.2d 684, the court rejected a defense argument that a teenage driver who was killed in a rear-end collision was negligent per se because he was operating a truck "without a chauffeur's license in violation of the law." (*Id.* at pp. 688–689.) Instead, a "driver's negligence is to be determined by the facts of the accident, and that the failure to have an operator's license is not evidence of the driver's incompetence or negligence, or that such negligence, if any, was the proximate cause of the accident." (*Id.* at p. 691.)

Cases of negligent entrustment also "require[] demonstration of actual knowledge of facts showing or suggesting the driver's incompetence—not merely his lack of a license." (*Dodge Ctr. v. Superior Court* (1988) 199 Cal.App.3d 332, 341.) The risk of prejudice of evidence of lack of licensure generally outweighs the probative value of the evidence because "lack of a license does not demonstrate negligence of the driver per se, [citations.] For liability to exist, knowledge must be shown of the user's incompetence or inability safely to use the [vehicle]." (*Ibid*; *Lehmuth v. Long Beach Unified School Dist.* (1960) 53 Cal.2d 544, 554 [possession of a driver's license is immaterial to determine if an operator was negligent at the time and place of an accident; "[i]f an accident occurs, the determination of care or lack of care must be determined from the facts of the accident"]; *Wysock v. Borchers Bros.* (1951) 104 Cal.App.2d 571, 582 (*Wysock*) [nonpossession of a license "is not of itself proof that a person is an incompetent or a careless driver"].)

Even if the lack of a license may be relevant for some purpose, a risk exists the jury would be misled by use of a limiting instruction or confused as to the permissible use of the evidence. (See *Wysock*, *supra*, 104, Cal.App.2d at p. 587; *Shmatovich*, *supra*, 187 Cal.App.2d at pp. 347–348.)

D

In this case, the lack of a Class B license alone could not establish liability for either Golston or ReCon. Even for negligence per se, there is no presumption of negligence if the violation of the statute is not shown to have proximately caused the death or injury. (Evid. Code, § 669, subd. (a)(2).)

Although the court determined Hertz could not present direct evidence regarding non-licensure because the risk of prejudice outweighed the probative value of the evidence, it permitted Hertz to present evidence throughout the trial about Golston's lack of specialized training or skill to operate a water truck on a highway. Hertz presented evidence ReCon knew the operation of a 2,000-gallon water truck on a highway required specialized skill, training, and testing. Perales admitted neither the ReCon certification nor the defensive driving course qualified Golston to operate the vehicle on a highway. Hertz presented evidence Golston did not possess the qualifications or skill to operate a water truck on a highway.

Defense expert, Paul Herbert, testified a water truck like the one Golston drove was one class lower than a tractor-trailer rig. Although Herbert did not use the term Class B licensure, he explained the operation of a truck like this required, "[s]pecialized skill, knowledge[,] and training." He said the most common method to obtain the

training is attendance at a four-week truck driving school. The course covers tank vehicles and the properties of liquid loads. Drivers are taught how to handle liquid loads through turns and the importance of slowing down. Tank trucks have a higher center of gravity than other trucks and a lower rollover threshold. The movement or sloshing of the liquid load affects the stability of the truck, particularly when cornering. Herbert also described how truck drivers are taught about the hazards of braking in a turn and the importance of downshifting and double-clutching to slow down for a turn instead of braking.

Herbert noted Golston had experience operating tank trucks in an off-road environment at slow speeds. Herbert said traveling 35 miles per hour for a left turn was contradictory to training in the truck driving course. He opined the safe speed for a left turn at a right-angle intersection would be in the range of 10 to 15 miles per hour because at greater speeds the water truck would become unstable.

Herbert opined Golston was not adequately trained or qualified and he did not "possess the necessary skills or knowledge to safely operate this type of vehicle loaded on a highway." He further opined ReCon did not satisfy its responsibility to ensure Golston was properly trained to operate the water truck with a manual transmission on the highway. The defensive driving school offered by ReCon did not cover driving a tank truck, speed, or liquid loads and would not qualify someone to operate a water truck on a highway.

Contrary to Hertz's contention on appeal, it was not deprived of the opportunity to present evidence that its contract included a warning. Hertz presented evidence through

witnesses that Hertz's rental contract advised ReCon "about the qualifications that the operator of the subject vehicle must have." Although the jury was not shown the contractual language referring to a Class B license, witnesses agreed the Hertz rental contract required the operator of the water truck to have specialized skill, training, and testing, which Golston did not possess.

James Sberna, ReCon's corporate health and safety manager at the time of the incident, agreed Golston should not have been permitted to operate the water truck on the highway under the terms of the rental contract regarding driver qualifications or under ReCon's safety policy and procedures. Sberna said it was a failure on the part of ReCon to put production ahead of safety.

At the end of the trial, when the jurors asked to see the contract, the court and counsel discussed the fact that evidence came in through a defense expert and others about the contract's requirement that the operator possess necessary qualifications. The court ruled the contract language would not be sent to the jury based on the motion in limine ruling and hearsay grounds. The court explained to the jury they could not see the contract, but the court had the pertinent portions of the witness testimony about the contract requirements read back to the jury.

Under the circumstances of this case, we conclude there was no prejudicial abuse of discretion in excluding specific reference to Golston's lack of a Class B license or the specific contractual language.

DISPOSITION

The judgment is reversed. The parties shall bear their own costs on appeal.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

IRION, J.